

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of November, two thousand and seven.

PRESENT:

HON. PIERRE N. LEVAL,
HON. SONIA SOTOMAYOR,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Kenneth Cunningham,

Plaintiff-Appellant,

-v.-

No. 05-5072-pr

The Department of Correctional Services, W.E. Phillips,
Green Haven Correctional Facility Superintendent, Dr. Carl J.
Keonigsmann, Medical Director, Green Haven Correctional
Facility, Hari Chakravorty, Green Haven Correctional Facility
Health Provider, Dr. Weinstein, Green Haven Correctional
Facility Psychiatrist, Dr. Harry Mamis, Green Haven Correctional
Facility Optometrist,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT: SARAH E. MCCALLUM, Skadden, Arps, Slate, Meagher & Flom LLP (Preeta D. Bansal, *on the brief*), New York, New York.

FOR DEFENDANTS-APPELLEES: DAVID LAWRENCE III, Assistant Solicitor General (Andrew M. Cuomo, Attorney General of the State of New York, Barbara D. Underwood, Solicitor General, Michael S. Belohlavek, Senior Counsel, *on the brief*), New York, New York.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the dismissal of the complaint is AFFIRMED in part and VACATED and REMANDED in part.

Plaintiff-appellant Kenneth Cunningham (“Cunningham”), a New York State inmate, appeals from an order, dated June 22, 2005, of the United States District Court for the Southern District of New York (Brieant, J.) dismissing his *pro se* action commenced under 42 U.S.C. § 1983 against the Department of Correctional Services (“DOCS”); W.E. Phillips, Superintendent of the Green Haven Correctional Facility (“Green Haven”); Dr. Carl Keonigsmann, Medical Director at Green Haven; and Drs. Hari Chakravorty, Steven Weinstein, and Harry Mamis, medical providers at Green Haven (collectively, the “Defendants”), alleging deliberate indifference to his serious medical needs in violation of the Eighth Amendment. The only claim before us in this appeal concerns Cunningham’s allegation that he was denied two Bicillin injections prescribed to him for continuing treatment of syphilis. We assume the parties’ familiarity with the underlying facts and procedural history of this case.

We review *de novo* the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6), accepting as true all factual allegations pleaded in the complaint and drawing all inferences in the plaintiff’s favor. *See Macias v. Zenk*, 495 F.3d 37, 40 (2d Cir. 2007). We also review *de novo* “a district court’s ruling on whether a plaintiff whose claim is governed by the PLRA has exhausted administrative remedies.” *Ortiz v. McBride*, 380 F.3d 649, 653 (2d Cir. 2004).

The district court dismissed Cunningham’s complaint based on the Defendants’ representations that Cunningham filed one medical grievance that did not raise the denial of Bicillin injections. On appeal, the state located prison records revealing that Cunningham did, in fact, file a separate grievance complaining about the denial of the second and third Bicillin injections prescribed to him. Defendants now argue on appeal that Cunningham failed to complete the administrative process for the separate grievance, GH 53735-04. We do not entertain arguments not raised below. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005). The late disclosure of documents frustrated effective review by the district court of the motion to dismiss and any potentially applicable equitable defenses. Accordingly, we vacate and remand the dismissal of Cunningham’s complaint inasmuch as it relates to the denial of Bicillin

injections, and we hold that the Defendants are precluded from asserting failure to exhaust with respect to this claim. *Cf. Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004) (outlining three-part inquiry for the court when an inmate “plausibly seeks to counter” the defense of failure to exhaust).

We AFFIRM in part the judgment of dismissal with respect to Dr. Weinstein and Dr. Mamis, because the claims against them do not relate to the failure to provide Bicillin injections. For the reasons stated above, we VACATE the district court judgment of dismissal against the remaining Defendants and REMAND to the district court for further proceedings consistent with this order.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk

By:_____